IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1371~~ 143

SKELLY OIL COMPANY, HUMBLE OIL & REFINING COMPANY, MRS. JAMES R. DOUGHERTY, ET AL., W. A. STOCKARD, ET AL., EDWIN M. JONES OIL COMPANY,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK and LONG ISLAND LIGHTING COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARTIN N. ERCK
FRANK S. TROIDL
P.O. Box 2180
Houston, Texas 77001
Attorneys for Petitioner, Humble Oil & Refining Company

BERNARD A. FOSTER, JR.
Ross, Marsh & Foster
725 15th Street, N. W.
Washington, D. C. 20005
Attorney for Petitioners, Mrs. James R. Dougherty W. A. Stockard Edwin M. Jones Oil Company

SHERMAN S. POLAND
Ross, Marsh & Foster
725 15th Street, N. W.
Washington, D. C. 20005

RICHARD J. DENT
P.O. Box 1650
Tulsa, Oklahoma 74102

Attorneys for Petitioner, Skelly Oil Company

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in Nos. 19,796, 19,800, and 19,919 on February 7, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals in Nos. 19,796, 19,800 and 19,919 is not yet reported; it is printed in Appendix B hereto, *infra,* pp. 3a-35a. The Court's

opinion relates to two opinions of the Federal Power Commission (Commission) each of which, in turn, relates to a large number of producer applications under Section 7 of the Natural Gas Act for certificates of public convenience and necessity which were consolidated for purposes of hearing and decision. The Opinion of the Commission under review in No. 19,796 (Opinion No. 475, the *Hawkins* case) is printed in the Joint Appendix below at H.R. 7292-7317 and is reported at 34 FPC 897 (1965).[1] The Commission's order on rehearing in that case (Opinion No. 475-A) is printed in the Joint Appendix below at H.R. 7505-7508 and is reported at 34 FPC 1330 (1965). The Commission's Opinion under review in Nos. 19,800 and 19,919 (Opinion No. 476, the *Sinclair* case) is printed in the Joint Appendix below at S.R. 4172-4193 and is reported at 34 FPC 930 (1965). The Commission's order on rehearing in that case (Opinion No. 476-A) is printed in the Joint Appendix below at S.R. 4283-4287 and is reported at 34 FPC 1357 (1965).

JURISDICTION

The opinion of the Court of Appeals in Nos. 19,796, 19,800, and 19,919 was filed on February 7, 1967. Jurisdiction of this Court over the judgment is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. § 717r(b) (1958).

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[1] Separate Joint Appendices were filed in the proceedings below. The record contained in the Joint Appendix in the *Hawkins* case, No. 19,796, will be designated herein as "H.R. ——"; the record contained in the Joint Appendix in the *Sinclair* case, Nos. 19,800 and 19,919, will be designated herein as "S.R. ——".

QUESTIONS PRESENTED

A prime determinant in issuing a certificate of public convenience and necessity to an independent producer pursuant to Section 7 of the Natural Gas Act is the establishment of an in-line price at which the sale may be made. *Atlantic Refining Co.* v. *P.S.C. of State of New York,* 360 U.S. 378, 391-392 (1959); *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223, 226-228 (1965).

One question presented in this case is whether the Commission, in establishing the several in-line prices for the sales involved, is obligated to disregard current conditions in the areas which might affect the price levels, including prices being collected pursuant to temporary certificates, contract prices, and its own price guidelines.

The Court below also held that the Commission is required in producer certificate proceedings to determine whether consumers which are customers of pipelines purchasing from producers, or even customers of such customers, will use the gas in an "economically inferior way." The second question presented is whether producer applicants or the Commission are required to show that the gas to be sold will not eventually be used by some consumer in an "economically inferior way."

STATUTE INVOLVED

The statutory provisions involved are Sections 7(c) and 7(e) of the Natural Gas Act, 52 Stat. 825 (1938), 56 Stat. 84 (1942), 15 U.S.C. §§ 717f(c) and (e). These sections are printed in Appendix A hereto, *infra,* pp. 1a-2a.

STATEMENT

These proceedings arose upon applications pursuant to Section 7 of the Natural Gas Act filed by independent producers seeking certificates of public convenience and necessity authorizing sales to interstate pipeline companies. Case No. 19,796 relates to producer sales in Texas Railroad District No. 3 (the *Hawkins* case).[2] Case Nos. 19,800 and 19,919 relate to producer sales in Texas Railroad District No. 2 (the *Sinclair* case).[3]

[2] No. 19,796 involves review sought by the Public Service Commission of the State of New York of the Commission's Opinion No. 475 in which the Commission granted 36 applications for certificates which had been consolidated for purposes of hearing and decision in Hawkins & Hawkins, *et al.*, Docket Nos. G-18077, *et al.*

[3] No. 19,800 involves review sought by the Public Service Commission of the State of New York of the Commission's Opinion No. 476 in which the Commission granted 41 applications for certificates which had been consolidated for purposes of hearing and decision in Sinclair Oil & Gas Co., *et al.*, Docket Nos. G-16760, *et al.* No. 19,919 also involves review of Opinion No. 476 on petition filed by Long Island Lighting Company.

In its Statement of General Policy No. 61-1, issued September 28, 1960 (24 FPC 818), the Commission established 24 pricing areas for the sales of natural gas by independent producers. Texas Railroad District Nos. 2 and 3 were among the pricing areas so established. In the orders consolidating producer applications for hearing and decision, the Commission simply consolidated pending producer applications in each of the two Railroad Districts. Similar consolidated proceedings have been held with respect to other pricing areas. See, *e.g.*, Union Texas Petroleum, Inc., *et al.*, Docket Nos. G-13221, *et al.*, Opinion No. 436, 32 FPC 254 (1964) [the South Louisiana Area], aff'd in part and rev'd in part, *sub nom.*, Pan American Petroleum Corporation v. F.P.C., — F. 2d —, Nos. 7912, *et al.* (10th Cir. decided March 9, 1967), Amerada Petroleum Corp., *et al.*, Docket Nos. CI62-1544, *et al.*, Opinion No. 422, 31 FPC 623 (1964) [Texas Railroad District No. 4], aff'd in part and rev'd in part, *sub nom.* Sunray DX Oil Co. v. F.P.C., 370 F. 2d 181 (10th Cir. 1966).

The Court below wrote a single opinion covering all three cases.[4]

In determining the appropriate price levels at which the permanent certificates in both areas should issue, the Commission applied the "in-line price" test initiated in *Atlantic Refining Co.* v. *Public Service Commission of State of New York,* 360 U.S. 378 (1959) and approved in many court proceedings, including review by this Court in *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223 (1965). For Railroad District 3 (*Hawkins*) it derived two "in-line" price levels, one at 16.0 cents per Mcf for contracts executed during a period from January 1, 1958 to September 28, 1960, and the other at 17.0 cents per Mcf for contracts executed from September 28, 1960 to January 1, 1964. For Railroad District No. 2 (*Sinclair*) the Commission also divided the consolidated proceedings into two time periods in deriving the applicable in-line price levels. From January 1, 1957 to September 28, 1960, the in-line price was fixed at 15.0 cents per Mcf. For the period subsequent to September 28, 1960, to a cut-off date of March 10, 1964, the Commission fixed the in-line price at 16.0 cents per Mcf. Based upon these determinations, the Commission certificated sales in Railroad District Nos. 2 and 3 at prices not to exceed the applicable "in-line" price levels.

In each instance, the Commission made its determination based upon an analysis of prices at which substantial amounts of gas were flowing in interstate com-

[4] The opinion of the Court below also related to Nos. 19,941 and 19,957 which were petitions for review filed by Continental Oil Company and The Superior Oil Company, respectively.

merce during the time period involved. For example, in *Sinclair* it held (S.R. 4175):

"The Examiner correctly observed that the beginning point in any in-line price decision is *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959) (CATCO), in which the Court stressed the importance of the Commission's responsibilities to scrutinize the level of initial prices for new sales by producers to assure that they do not establish higher pricing levels in the area without explanation. Following that decision, we enunciated definitive standards for exercising our responsibilities in a series of opinions beginning with *Skelly Oil Company,* Opinion No. 362, 28 FPC 401 (1962), and *Texaco Seaboard, Inc.,* Opinion No. 383, 29 FPC 593 (1963), and continuing through *Union Texas Petroleum Company,* Opinion No. 436, 32 FPC 254 (1964). Generally, we have held that the line to which initial producer prices must be related is the level at which substantial volumes of gas, not under judicial review, or otherwise suspect, move in interstate commerce during the time period under consideration. Where the substantial volumes of gas so moving have been under permanent certificates, we have relied principally upon the initial prices of natural gas sold under such permanent certificates in determining the in-line price. *Skelly Oil Company, supra, Texaco Seaboard, Inc., supra.* On the other hand, where the volumes of gas moving under permanent certificates were relatively insubstantial or failed adequately to reflect current conditions in the industry, we have given consideration to the initial prices of substantial volumes of natural gas sold under temporary certificates. *Amerada Petroleum Corporation,* Opinion No. 422, 31 FPC 623 (1964); *Union Texas Petroleum Company, supra.*"

The Commission's analysis included consideration of prices under permanently certificated sales but ex-

cluded certain sales which were not comparable with the sales for which certificates were sought (H.R. 7294, 34 FPC 900-901; S.R. 4179, 34 FPC 936) and compared quality specifications of the subject sales with previously certificated sales (H.R. 7295, 34 FPC 901). Consistent with past practice, the Commission attributed some weight, although not primary consideration, to contract prices since they show economic trends in the area (H.R. 7295, 34 FPC 902; S.R. 4180, 34 FPC 937). Likewise, it gave some weight to prices authorized under temporary certificates (H. R. 7295-7296, 34 FPC 902-903; S.R. 4179-4180, 34 FPC 936).

The Commission also directed its attention to a contention by the Public Service Commission of the State of New York (NYPSC) that the producers should have shown a public need for the gas before the certificates could be issued. In this connection, the fact is that the pipeline purchasers had been buying the gas from the producers for a number of years pursuant to temporary certificates. Nonetheless, NYPSC contended without any evidentiary showing that the pipelines or their customers did not need this particular gas since some of the pipelines were paying for gas not currently taken. The Commission recognized that, in order to maintain substantial reserves, pipelines are required to contract for supplies even though current deliveries cannot be scheduled to correspond precisely with the payments required under the take-or-pay contract provisions. The Commission concluded (H.R. 7293, 34 FPC 900):

> "[I]t is to be expected that such companies [pipeline purchasers] will occasionally have long-term contractors [sic] for supplies which will give them gas for the future, even though the supplies may be slightly in excess of their present-day needs.

The issue of public need should be confined to pipeline certificates, not producer applications."

After denial of rehearing, petitions for review were filed by NYPSC and Long Island Lighting Company (LILCo) in the Court of Appeals for the District of Columbia Circuit. These petitions sought reversal of the Commission's opinions, arguing that the in-line prices were too high and that there was no public need for the gas.

THE OPINION OF THE COURT BELOW

By order issued March 7, 1966, the Court of Appeals for the District of Columbia Circuit consolidated the several proceedings for review. It had granted intervention of these petitioners by orders issued on January 4 and January 26, 1966, in No. 19,796; by order issued on January 5, 1966, in No. 19,800; and by order issued on March 14, 1966, in No. 19,919. In an opinion issued February 7, 1967, the Court set aside the Commission's opinions and orders and remanded the cases for further proceedings.

In reaching its conclusion the Court held that the Commission had not properly derived the in-line prices for the two areas. Specifically, the Court held the Commission's array of prices from which the in-line prices were derived should not have included contract prices or prices being collected under temporary certificates. According to the Court, the in-line price which forms the basis upon which sales are to be certificated should be established by reference only to permanently certificated prices which are not subject to review. By this holding, the Court would necessarily eliminate from Commission consideration a vital element, current conditions under which sales are made,

and would force a roll-back of prices to levels having no current relevancy.

In rejecting the current conditions test, the Court held that the Commission's guideline price levels which have been established for the several pricing areas throughout the country, pursuant to the Commission's Statement of General Policy No. 61-1, as amended,[5] should not be given any weight in determining the in-line price. Yet the Court recognized that the guideline price levels were fixed for the purpose of guidance and initial action by the Commission (App. B, pp. 20a-21a).

The Court also held that prices under temporary certificates could not be used because they are "suspect" in the sense that the prices charged may be subject to change at some later date (App. B, p. 23a).

Finally, the Court concluded that when permanently certificated sales are available for reference an in-line price "should not depend upon current conditions." (App. B, p. 26a). The obvious result of the Court's limitation on the in-line price test would be to require a price freeze which may, in fact, be at a level below the just and reasonable rate later fixed in an Area Rate proceeding.[6]

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[5] 24 FPC 819 (1960).

[6] For example, the Commission's certificate price level in the Permian Basin prior to its Area Rate Opinion in Docket Nos. AR61-1, *et al.* (the first area rate case) was 16.0 cents per Mcf, which is 0.5 cents per Mcf below the just and reasonable rate of 16.5 cents per Mcf fixed for new gas. It is also noteworthy that in the Texas Gulf Coast Area Rate Proceeding, Docket Nos. AR64-2, *et al.*, which includes the areas involved in these proceedings, the Commission's Staff is recommending rates for new gas of 16.4 cents per Mcf for gas without gathering and 16.8 cents per Mcf with gathering. If in-line prices should be fixed below the just and reasonable rate level, producers would have no recourse and would not be able to recoup the just and reasonable rate for the past period.

The Court also held that the Commission's Opinions were deficient because of the lack of consideration of public need for the gas. The Court concluded that the Commission should consider not only market demand for the gas but also conservation and prevention of waste. The Court suggested that the Commission should weigh the comparative needs of pipelines and their customers and should not issue a producer certificate if the pipeline plans to resell the gas to a consumer who will use the gas in an "economically inferior way." (App. B, pp. 24a-26a).

REASONS FOR GRANTING THE WRIT

The decision of the Court below presents questions of substantial importance in the administration of the Natural Gas Act. One concerns mechanics for determining in-line price. Here, the opinion below is in conflict[7] with decisions of other Courts of Appeals and

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[7] We note the assertion in the opinion below that the opinion of the Tenth Circuit in Sunray DX Oil Company v. FPC, 370 F. 2d 181 (10th Cir. 1966) involved "a problem very different from ours." But the relevant facts in *Sunray* were similar to those in the *Sinclair* case (see S.R. 4179). This cannot be said as to *Hawkins* (see H.R. 7296). But the comparison of whatever the facts to one side, the thrust of the opinions of the two courts collide in the materially different rules which they applied.

While it is the view of Petitioner, Humble Oil & Refining Company, that, based upon a comparative analysis of the facts, the results reached by the Court below and the Tenth Circuit are reconcilable, it nevertheless urges a review of the opinion below because of the importance of the questions presented and erroneously decided by the District of Columbia Circuit.

even with its own prior decisions.[8] The other question concerns the necessity to show a "public need" for the gas proposed to be sold.[9]

1. The Lower Court's Refusal To Permit the Commission To Consider Prices Under Temporary Certificates and Other Indicia of Current Conditions When Fixing an In-Line Price Presents an Important Question as to the Manner in Which Producer Sales Shall Be Certificated Which Conflicts With the Rule of Law Established by This Court, as Amplified by Various Courts of Appeals.

In the opinion below the Court held that determination of an in-line price is not dependent upon current conditions. According to the lower court, an in-line price should be frozen pending outcome of rate proceedings under Sections 4 and 5 of the Natural Gas Act (App. B, p. 26a). These concepts, if approved, would have a vital effect upon the Commission's in-line price determinations and severely limit the Commission certification procedures under Section 7 of

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[8] See Atlantic Refining Co. v. P.S.C. of N.Y., 360 U.S. 378 (1959); United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223 (1965); Sunray DX Oil Co. v. F.P.C., 370 F. 2d 181 (10th Cir. 1966); Pan American Petroleum Corp. v. F.P.C., — F. 2d — (Nos. 7912, *et al.*, 10th Cir., decided March 9, 1967); United Gas Improvement Co. v. F.P.C., 283 F. 2d 817 (9th Cir. 1960); P.S.C. of New York v. F.P.C., 329 F. 2d 242, *cert. den.* on other grounds, *sub nom.* Prado Oil & Gas Co. v. F.P.C., 377 U.S. 963 (1964); Atlantic Refining Co. v. F.P.C., 316 F. 2d 677 (D.C. Cir. 1963).

[9] The *Sunray* decision expressly denied Commission power to order refunds. Since this issue was not dealt with in the opinion of the Court below, it will not be discussed here. Petitioners deny that the Commission has power to order refunds of amounts collected pursuant to unconditioned temporary certificates and reserve their right to support that position if the issue is subsequently briefed and argued in this Court.

the Natural Gas Act. They would effectively prohibit the Commission from testing proposed prices against a price line which represents current conditions in the area during the relevant time period. Since Commission certification of producer sales not only governs the price at which gas is permitted to enter the interstate market, but also establishes the terms upon which gas is to be sold over a considerable period of time pending determination of a just and reasonable rate in area rate proceedings, the impact of a price freeze or roll-back cannot be overemphasized.[10]

Furthermore, exclusion of evidence of current conditions as represented by prices under temporary certificates, contract prices, and guideline rates would result in an abdication of Commission responsibility and would permit parties with an adverse interest to determine the in-line price. For, if the Commission consideration were limited to permanently certificated sales which are not subject to any review, any utility customer of a pipeline could control the prices which the Commission could consider, and thereby effectively fix the price line. The adverse party could determine the in-line price merely by contesting all prices above a level of its own choosing. As the Commission itself

[10] The Court below recognized that the in-line price will be effective for an "interim period between sales of gas and the rate determination under § 4 or § 5 of the Act." But the lower court failed to note that the "interim period" may last a decade or more. Notably, since producer regulation was undertaken in 1954, there has been no area rate determination for Texas Railroad Districts 2 and 3. The area rate case involving those districts in Docket Nos. AR64-2, *et al.*, was begun in 1963, but the presiding examiner's decision has not yet issued.

held in its Opinion No. 422 involving its determination of an in-line price in Texas Railroad District No. 4:[11]

> "It is not by chance that . . . the only permanent certificates granted during the period were at prices of 15 cents per Mcf or lower, because all applications for higher prices were opposed by some or all of the interveners herein. If these permanent certificates are to control, then the 'in-line' price for sales representing over seven times the minimal volumes of gas permanently certificated during this period is being determined, not upon consideration of a hearing record, but by the unreviewable fiat of the interveners."

Moreover, the opinion below constitutes an abrupt departure from the in-line price concept first announced by this Court in the *CATCO* case.[12] In that case, this Court reversed a Commission order granting certificates at the contract price because it appeared that the price was out-of-line and might "trigger" increases in other prices in the area (360 U.S. at 391-392). Notably, there was nothing in *CATCO* which required, or even suggested, that all certificate prices should be frozen at, or rolled back to, some pre-existing level pending the outcome of just and reasonable rate proceedings under Sections 4 or 5 of the Natural Gas Act.

Numerous decisions by many Courts of Appeals have successively reviewed Commission's application of the CATCO formula, commonly known as the in-line price test. As noted above the Commission suc-

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[11] Amerada Petroleum Corp., *et al.*, Opinion No. 422, 31 FPC 623, 632 (1964), aff'd in pertinent part, *sub nom.* Sunray DX Oil Co. v. F.P.C., 370 F. 2d 181 (10th Cir. 1966).

[12] Atlantic Refining Co. v. P.S.C. of N.Y., 360 U.S. 378 (1959).

cinctly stated the in-line price test to be a comparison of proposed prices with the price level at which substantial volumes of gas, not under judicial review or otherwise suspect, flow in interstate commerce during the time period under consideration. Where permanently certificated prices fail to reflect current conditions, consideration is also given to sales under temporary certificates (H.R. 7295-7296; S.R. 4179).

The Court of Appeals for the Tenth Circuit has recently reaffirmed Commission reference to current conditions under which gas is sold, including prices under temporary certificates and the effect of the Commission's guideline prices established in its Statement of General Policy No. 61-1, as amended. Thus, in *Sunray DX Oil Co.* v. *F.P.C.*, 370 F. 2d 181, 186-187 (1966), the Court of Appeals for the Tenth Circuit held that the Commission is obligated to evaluate the effect of its guideline prices upon the price line. Contrast the opinion below which held that the guideline prices should be given no consideration (App. B, pp. 20a-21a).

The Tenth Circuit also expressly rejected a contention that a price line, once established, does not change until determination of a just and reasonable rate (370 F. 2d 187). A price line, that Court held, must reflect current conditions, noting (370 F. 2d 187-188):

> "The Commission has recognized that the in-line price must reflect current conditions. The Courts of Appeals have agreed. Further support is found in the Callery decision where the Supreme Court referred to 'other contemporaneous certificates' and 'prices higher than existing levels.' We concur with the Commission that once the in-line price is established it is presumed to continue not

> until the just and reasonable rate is determined but until 'substantial evidence is presented that it has changed.'" (Footnotes omitted.)

The Court below, on the other hand, declared (App. B, p. 26a):

> "We presume that the in-line price will be adjusted after the Commission determines the just and reasonable price. It is true that our decision may cause the in-line price to be frozen temporarily during the interim period between sales of gas and the rate determination under §4 or §5 of the Act."

Notably, the interim period referred to by the Court below can hardly be characterized as "temporary" since, in the thirteen year history of producer regulation, the Commission has never determined the just and reasonable rate in the Texas Gulf Coast Area.

Most importantly, the Tenth Circuit held that reference to prices under temporary certificates is justified in order to determine current price conditions (370 F. 2d 189). Of course, the Tenth Circuit recognized that the weight to be accorded to prices under temporary certificates will vary depending upon the circumstances in each case. Thus, it noted that in the *Skelly* case the Court of Appeals for the District of Columbia Circuit had affirmed a Commission opinion which held that temporary certificates were "not as persuasive" as permanent certificate prices (370 F. 2d 190).

Although the Court below suggested that prices under temporary certificates might be utilized in fixing a price line if no permanently certificated prices were available for reference, it flatly rejected consideration of such prices if permanently certificated prices are

available. In contrast, the Tenth Circuit's *Sunray* opinion declared that prices under temporary certificates constitute important indicia of the price line even when permanently certificated prices are available. The rule of law asserted by the Court below, unlike *Sunray* and opinions in other Circuits, drastically limits and modifies the in-line price concept.

Certainly, prices under temporary certificates are not to be rejected as "suspect." In *Sunray*, the Court noted with approval that, in determination of an in-line price, permanent certificates have a greater weight than do either temporary certificates or contract rates under attack. Since an in-line price is intended to reflect the price at which substantial volumes of gas are currently contracted for sale in interstate commerce, the Tenth Circuit reasoned, use of prices under temporary certificates cannot be denied on the grounds that they are "suspect." But the opinion below requires that no consideration be given to prices under temporary certificates, on the theory that such prices are "suspect."

We submit that the rationale of the opinion below that current conditions should be ignored in determining an in-line price is irreconcilable with the rationale of *Sunray* which holds that current conditions cannot be ignored.

The opinion below is also in conflict with the opinion of the Court of Appeals for the Tenth Circuit in *Pan American Petroleum Corp.* v. *F.P.C.*, Nos. 7912, *et al.*, decided March 9, 1967, where the Court held (Slip Opinion, p. 15):

> "Temporary certificates are now conditioned rather than perfunctorily granted. Contract prices

have made some adjustment in view of the inescapable captured market of regulation. The establishment of guidelines is a considered administrative function. Settlement agreements are a recognized and judicially encouraged instrument to provide both a semblance of price stability to producers and to mitigate against delay to the consumer interests. * * * We consider each of these procedural and background incidents to have proper evidentiary significance in a section 7 proceeding to be weighed by the Commission against the impact of more probative evidence such as permanent certificates in its determination of in-line prices."

The opinion below also departs from other opinions of the same Court. Thus, it has described the in-line price test to mean the determination of a price line "at which similar sales, not suspect, were made under similar circumstances from the same area about the same time."[13]

In the same case, the Court approved Commission use of contract prices and prices collected under *temporary certificates* when it affirmed the in-line price determinations. The Commission had carefully attempted to reflect current conditions by dividing a 17-month time span into two periods and determining a separate in-line price for each period. The Commission had held (27 FPC 551 at 553):

"As a guide in determining whether each applicant's 18.5 cent price is 'out of line,' as that phrase is used in the CATCO decision, the staff exhibit shows that during the period from June 1958 to October 1959, in which the 14 contracts involved herein were signed, 44 other contracts were made

[13] Atlantic Refining Co. v. F.P.C., 316 F. 2d 677, 680 (1963).

for jurisdictional sales in North Louisiana at prices ranging from 12.5 cents to 18.5 cents per Mcf. Of the 29 sales made during the first eleven months of this period, 21 were priced at 16.5 cents, and 12 of these have been permanently certificated. Of the 15 sales made during the last six months, 8 were priced at 17.0 cents, and 2 of these have been permanently certificated. In 1958 three non-jurisdictional sales from the area were negotiated at prices from 18 to 19.5 cents; but from 1957 through 1960 only one jurisdictional sale has been permanently certificated at 18.5 cents. Assuming that the objections to considering this last sale are without merit, it is nevertheless apparent that the 'in-line' price in North Louisiana was 16.5 cents until May, 1959; and thereafter, it was 17.0 cents." (Footnotes omitted.)

Note that the increase of the in-line price from 16.5 cents per Mcf to 17.0 cents per Mcf reflected current conditions including prices under temporary certificates and necessarily rejected the concept of a price freeze inherent in the opinion below.

The opinion below also conflicts with its own opinion in *P.S.C. of New York* v. *F.P.C.*, 329 F. 2d 242 (D.C. Cir. 1964) where it upheld the Commission's determination of an in-line price based in part upon prices allowed under temporary certificates (329 F. 2d at 246). In that case,[14] as in the cases here under review, the Commission attributed less weight to the prices under temporary certificates than to permanently certificated prices (H.R. 7295-7296). But some consider-

[14] P.S.C. of New York v. F.P.C., 329 F. 2d 242 (D.C. Cir. 1964), is commonly known as the *Skelly* case because Skelly Oil Company's docket was the lead docket in the consolidated proceedings before the Commission.

ation of prices under temporary certificates was obviously necessary if the in-line price test were not to be converted into a price freeze or roll-back and certificate proceedings to be rendered meaningless (H.R. 7296).

The opinion below conflicts with the *Skelly* case in another significant respect. The producers argued in *Skelly* that the 15 cent in-line price for the 1958-1960 period was too low because the Commission should have considered 16 and 17 cent permanently certificated prices executed during 1956 and 1957. The Court affirmed the Commission's refusal to consider prices during the earlier period, holding that such sales "did not establish a valid line of 16 to 17 cents for the area during the 1958 to 1960 period," thus disavowing any price freeze or roll-back concept. It may be noted that, if the lower court's present position as evidenced by the opinion below had prevailed, the Commission would have been required to give weight to the 16-17 cent prices. Of course, in that case, the refusal to consider current conditions would have resulted in a higher price line.

The opinion below is unique. It is also wrong. It is the only court opinion which holds that the Commission, in determining the present and future public convenience and necessity, must blind itself to current conditions and thereby to freeze or roll back prices at levels which have no current relevancy. Contrast *United Gas Improvement Co.* v. *F.P.C.,* where the Ninth Circuit Court held [283 F. 2d 817, 824 (9th Cir. 1960)]:

> "As previously indicated, the price line is intended to reflect current conditions in the industry.

Therefore, comparative prices upon which it is based must be prices under which a substantial amount of natural gas presently moves in interstate commerce. The limitation urged by UGI could well defeat this objective by restricting the comparison to a small number of contracts under which little gas moves today. It could, in fact, require a rollback to prices having no current relevancy."

2. The Lower Court's Holding That a Producer Applicant Must Show That Consumers Will Not Use His Gas in an Economically Inferior Way Presents a Question of Primary Importance in Administration of the Natural Gas Act.

In addition to the conflict with the opinions of this Court and the Courts of Appeals in other Circuits, the opinion below presents a question of exceptional importance in administration of the Natural Gas Act. NYPSC contended that producers are required to show need for the gas before their sales can be permanently certificated. In upholding NYPSC's contention the Court below went far beyond the issue raised. NYPSC had argued in the narrow sense that the pipeline purchasers might not need the gas because they might be forced, pursuant to their gas purchase contracts, to pay for gas before deliveries could be scheduled. Yet the Court below held that the Commission must not only consider the effect of new purchases upon a pipeline's take-or-pay-for position, but also declared that the Commission, when processing a producer's application, must determine whether the pipeline purchaser or its customers, which are unknown to the producer, will use the gas in an "economically 'inferior' way." Accord-

ing to the Court below, the Commission "must consider *all* alternative uses." (App. B, p. 10a). Under the lower court's rationale, either the Commission or an independent producer, such as Mrs. Dougherty, must show, before she is entitled to a certificate covering her contract with Natural Gas Pipeline Company of America, that her gas could not be more economically used by customers of some other pipeline.

In final analysis, the Court's opinion below would require expansion of the Commission's powers in a manner not susceptible of rational administration. It would either impose upon producer applicants an impossible burden or make them entirely dependent for proof of public convenience and necessity upon the Commission's discretion as to what evidence it would develop to support the applicants' case.

CONCLUSION

The opinion below raises important questions in administration of Section 7 of the Natural Gas Act and conflicts with opinions of this Court and other Courts of Appeals, particularly the opinion of the Tenth Circuit in *Sunray DX Oil Co.* v. *F.P.C.*, 370 F. 2d 181 (1966). Such questions require resolution by this Court. Likewise, the issue raised by the breadth of the lower court's holding as to the duty of producer applicants and the Commission in establishing a public need for gas in producer certificate cases is of tran-

scendent public importance which should be reviewed by this Court.

Respectfully submitted,

MARTIN N. ERCK
FRANK S. TROIDL
P.O. Box 2180
Houston, Texas 77001
Attorneys for Petitioner, Humble Oil & Refining Company

BERNARD A. FOSTER, JR.
Ross, Marsh & Foster
725 15th Street, N. W.
Washington, D. C. 20005
Attorney for Petitioners, Mrs. James R. Dougherty W. A. Stockard Edwin M. Jones Oil Company

SHERMAN S. POLAND
Ross, Marsh & Foster
725 15th Street, N. W.
Washington, D. C. 20005

RICHARD J. DENT
P.O. Box 1650
Tulsa, Oklahoma 74102

Attorneys for Petitioner, Skelly Oil Company

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